BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
LA SALLE HOTEL COMPANY)

Appearances:

For Appellant: Leon Katz, Attorney at Law
Robert Weinberg, Ckrtified Public Accountant

For Respondent: Lawrence C. Counts
Associate Tax Counsel

O P I N I O N

This appeal is made pursuant to section 26077 of the Revenue and Taxation Code from the action of the Franchise Tax Board denying the claim of La Salle Hotel Company for refund of penalty payments in the amount of $2,074.42 and interest of $77.77 based on franchise tax for the income year ended June 30, 1963.

Appellant, a Missouri corporation, has been engaged in business in California since 1951. It has adopted a fiscal year commencing July 1 and ending June 30. As a general corporation, its franchise tax return for the income year ended June 30, 1963, was due on September 15, 1963. (Rev. & Tax. Code, § 25401.) The second installment of taxes due was payable on or before March 15, 1964. (Rev. & Tax. Code, former § 25551a.)

On or about September 12, 1963, appellant submitted a request for an extension of time to file its return for the income year ended June 30, 1963, and accompanied the request with a payment of $4,000. Respondent granted appellant's request and extended the time for it to file a timely return to

December 15, 1963. The following sequence of events and alleged events occurred thereafter:

1. Respondent allegedly did not receive appellant's return on or before December 15, 1963.

2. Appellant did not pay the second installment of the taxes due on March 15, 1964.

3. On March 16, 1964, respondent allegedly wrote appellant advising that its records indicated that no return had been filed and-demanded that appellant file the return and remit taxes due plus penalty of $1,574.42 for failure to file and interest from the due date.

4. Appellant allegedly did not receive respondent's written communication of March 16, 1964.

5. On June 3, 1964, respondent mailed appellant a Notice of Arbitrary Assessment of Taxes and Demand for Payment of Taxes Due in the amount of $2,000. This writing also contained notice of assessment of an additional 25 percent penalty of $500 for failure to file after notice and demand.

6. Appellant replied on June 18, advising that it had filed its return on October 17, 1963, and enclosed a copy of the return. It also enclosed a check in payment of $2,297.67 in additional. taxes due plus interest, but did not then pay the penalties assessed. It explained that timeJ.y payment of the second tax installment had not been made because a notice of balance of tax due had not been received,

7. On August 12, respondent wrote appellant advising that the explanation of delinquency did not show that the failure to file a timely return was due to reasonable cause.

8. Appellant paid the penalties on November 30, 1964, plus interest thereon.

9. On May 3, 1965, it filed a timely claim for refund of the payment.

10. Respondent denied appellant's claim for refund and this appeal followed.

The primary questions presented by this appeal are whether appellant filed a timely return for the income year ended June 30, 1963, and if not, whether its failure to file a timely return and its failure to file a return after notice and demand were due to reasonable cause. These questions present issues of fact and appellant has the burden of proof. (Cal. Admin. Code, tit. 18, § 5036; Otho J. Sharpe, 1956 T.C. Memo., Dkt. No. 44265, Nov. 26, 1956, appeal dismissed, 249 F.2d 447.)

Section 25931 of the Revenue and Taxation Code provides:

> If any taxpayer fails to make and file a return required by this part on or before the due date of the return or the due date as extended by the Franchise Tax Board, then, unless it is shown that the failure is due to reasonable cause and not due to wilful neglect, 5 percent of the tax shall be added to the tax for each 30 days or fraction thereof elapsing between the due date of the return and the date on which filed, but the total addition shall not exceed 25 percent of the tax . . . . (Emphasis added:)

Section 25932 provides:

> If any taxpayer, upon notice and demand by the Franchise Tax Board, fails or refuses to make and file a return required by this part, then, unless it is shown that such failure is due to reasonable cause and not due to wilful neglect, the Franchise Tax Board is authorized to make an estimate of the net income and to compute and levy the amount of the tax due from any available information, In such case

> 25 percent of the tax, in addition to the amounts added under Section 25931, shall be added to the tax and shall be due and payable upon notice and demand from the Franchise Tax Board. (Emphasis added.)

At the oral hearing before this board., a representative of an accounting firm testified that two copies of the return in question had been prepared and delivered to appellant on or about October 17, 1963. He related that the method used to complete the filing in previous years had always resulted in the filing of a timely return *and that* the same method was used ***to complete*** filing of the return for the year in question; In prior years, returns were delivered to appellant's bookkeeper who presented them to the corporation officer responsible for their execution. After execution, they were returned to appellant's bookkeeper or given to a secretary for mailing. The person to whom the return-here in question was delivered was not identified. Testimony was elicited that appellant had changed bookkeepers several times during the year 1964.

Respondent also alleges and appellant does not deny that its federal. income tas return for the year ended June 30, 1963, was not filed with the Collector of Internal Revenue'until June 17, 1964, together with a remittance of taxes due.

Giving due consideration to all the evidence presented, we conclude for the following reasons that appellant has failed to sustain its burden of proving a timely filing of the return,

A copy of the return dated October 17, 1963, when considered with the testimony of the accounting firm's representative, indicates *that* the return was actually prepared and delivered to appellant prior to December 15, 1963. However, evidence *that a* return *was* prepared prior to the due date does not; in itself,provea filing of the return. (Joseph E. Harrod, T.C. Memo., Dkt. No. 81541, October 31, 1961, Jan. 12, 1962; Irvine F. Belser, 10 T.C. 1031, aff'd, 174 F.2d 386, cert. denied, 338 U.S. 893 [94 L. Ed, 549].) There is no direct evidence that the return was actually executed or mailed, and respondent's official records indicate that no return was ever received by it. The production of a copy of a purported return without convincing evidence of mailing has been held insufficient to overcome official government records indicating that no return was filed.

(Sebastian Lucido, T.C. Memo., Dkt, Nos. 47645,. 47689, 47690, Jan. 31, 1955; Joseph Shalleck, T.C. Nemo., Dkt. No. 108299, Dec. 23, 1942.)

While evidence of a proper filing procedure in prior years may be considered, it is entitled to little weight here. The record discloses that the duty of completing the filing was customarily assigned to a person in a position which was held by a new employee during the critical period. It has not been demonstrated that the new employee was advised of the due date of the return or instructed in the proper procedure to complete the filing of it or that he made any attempt to file it.

The fact that appellant's federal tax return was not filed with the Collector of Internal Revenue until June 17, 1964, provides a strong indication that the state return was not filed before that date. The federal return was also due on December 15, 1963, *the* extended due date of the state return.! It is reasonable to assume that both returns would have been handled similarly. Appellant has made no attempt to explain the late filing of the federal return.

Appeal of Charlotte M. Van Riper and Estate of Reginald E. Van Riper, Cal. St. Bd. of Equal., Feb -19 1964, cited by appellant, provides no assistance. to it, There, a strong inference was drawn that a missing partnership return was actually filed with the state since related returns prepared in conjunction with it, that is, the equivalent federal return and the partners' individual state and 'federal returns, were properly filed, Here, the records of both the federal government and respondent indicate that no timely returns were -received from appellant. The inference, therefore, is not that appellant filed the return in question but that it failed to do so,

We now consider the evidence offered to prove reason- 'able cause for the failure to file, To establish "reasonable cause" it must be demonstratedthat the failure to file occurred notwithstanding the exercise of ordinary business care and prudence. (Haywood Lumber & Mining Co. v. Commissioner, 178 F.2d 769; Sanders v. Commissioner, 225 F.2d 629; Handley Motor Co. v. United States, 338 F.2d 361.)

Timely preparation and delivery of the return by appellant's accountant were prerequisites to a filing of the return but proof of the performance of these acts does not provide the reason for the failure to file. The only other evidence offered consists of a description of a successful filing procedure followed in other years.- 'From this we are asked to infer that all other reasonable steps to accomplish the filing were undertaken and to Supply the reason for the failure to file, We are asked to do this even though-the record discloses that conditions were not the same as in prior years in that the due date of the return had been extended and that newemployees had been hired who may not have been given proper instructions, Under the circumstances the inference to be drawn from the successful filing procedure followed in prior. years is too conjectural to warrant a deduction that ordinary business care and prudence was exercised in the current year. Appellant has not established reasonable cause for the failure to file prior to respondent's demand.

With respect to the additional penalty for failure to file after notice and demand,we are unable to accept as reasonable cause appellant's explanation that respondent's notice. and demand of March 16, 1964, was not received. A copy of the notice is contained in the record and subsequent letters posted to the same address were admittedly received. On the record before us, the likelihood is that the same type of confusion and Lack of due care that resulted in failure to file prior to respondent's demand , also resulted in overlooking the notice and demand.

As an alternate ground for refund, appellant contends that the penalties should have been computed on the basis of $2,297.67, which was the amount of tax payable after deduction. of the $4,000 payment made prior to December 15, 1963.

Respondent contends that the penalty for failure to file imposed under the authority of section 25931 must be computed upon the total tax as reflected by the return instead of the amount payable as of the due date. It submits that section 25932 requires that the penalty for failure to file after notice and demand be computed on the basis of the tax estimated. We agree with respondent's basis for computation of the penalties assessed.

Section 25931, which prescribes the basic penalty for failure to file, is substantially the same as section 291(a) of the 1939 Internal Revenue Code and its successor, section 6651(a) of the 1954 Internal Revenue Code. In West Virginia Steel Corp., 34 T.C. 851, the United States Tax Court ruled on the same question as that before us in considering the proper measure of the penalty imposed under section 291(a) of the Internal Revenue Code, It held that the application of the penalty to the total tax was in accordance with the plain language of the statute and that *any* other construction was not authorized. In *1954,* Congress enacted new section 6651(b) of the Internal Revenue Code, which expressly provides that the measure of the penalty be reduced by the amount of any part of the tax paid on or before the due date. A similar provision has not been added to our Revenue and Taxation Code. Any change in the application of section 25931 'must be provided by the Legislature and not by this board.

Under section 25932, on the other hand, the additional penalty for failure to file after notice and demand is based upon the amount of the tax estimated and levied by respondent, This is made clear by respondent's regulations, which state that "... the income of the taxpayer will be estimated and the tax assessed upon the basis of any available information. To the tax so assessed, a penalty of 25 percent ... must be added," (Cal, Admin. Code, tit. 18, reg. 25931-25933(b).) We have reached a similar conclusion under the *comparable* section of the Personal Income Tax Law. (Appeal of J. H. Hoeppel, Cal. St. Bd. of Equal., Feb. 26, 1962.) Thus, the penalty under section 25932 was properly based on the tax of $2,000 estimated by respondent.

Finding no error, we must sustain respondent's denial of appellant's claim for refund.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

Appeal of La Salle Hotel Company

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 26077 of the Revenue and Taxation Code, that the action of the Franchise Tax Board denying the claim of La Salle Hotel Company for refund of penalty payments in the amount of $2,074.42 and interest of $77.77 based on franchise tax for the income year ended June 30, 1963, be and the same is hereby sustained.

Done at Sacramento, California, this 23rd day of November, 1966, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST: _____, Secretary